Supreme Court, U.S.
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No. 98-1827

In The

Supreme Court of the United States

BEATRICE M. HUNT,

Petitioner,

v.

ANDREW M. HUNT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Hampshire

PETITIONER'S REPLY BRIEF

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REPLY

I. Reply to Respondent's misstatements of the record below.

The Respondent vainly relies on the trial court record for any inference that the court found a specific danger to the parties' child if the Respondent were not granted sole legal custody – as opposed to its clear record of inappropriately making that award to resolve an immunization disagreement. Respondent further misrepresents the record as containing a finding that the disagreement rises to the level of such danger, despite the trial court having declined to ever make such a finding.

Respondent's Brief in Opposition ("Respondent's Brief") contains lengthy allegations and implications of Petitioner's misconduct, bad motive and/or defective character, in or affecting the State court proceedings. The *record*, however, shows that this continues a deleterious artifice now employed by the Respondent in virtually everything he has filed: impeachment of the Petitioner's motives and diversion of the Court from the merits wherein Petitioner advances a fairly uncomplicated basis for regaining a share in the legal custody of her only child.

First, Respondent's Brief misstates the record by claiming that "the superior court record is replete with reprimands by the court." *Id.* at 2.

As reflected in Respondent's appendix, a superior court pre-trial order succinctly summarized Petitioner's stated position in declining visitation with the parties' child: "the child may be adversely affected when he

returns home." *Respondent's Brief,* App. 16 ("Appendix C") (*Decree,* DALPRA, Esq., Master (April 4, 1995); MCHUGH, J. (April 5, 1995)). Petitioner persisted in that position because she has been unable to obtain disclosure of Respondent's purportedly favorable court-ordered psychological profile. Petitioner can hardly be faulted for blindly entrusting her child's welfare to the judgment of others when she is denied the opportunity to know its basis.

Respondent grossly misrepresents the circumstances at trial, which commenced with the Petitioner lodging a due process objection, after which she stated that she was compelled by medical reasons to forgo attendance at trial during consideration of custody issues. With Petitioner then absent, the marital master committed unduly prejudicial evidentiary and other errors, treating the matter as if it were an uncontested divorce, *i.e.,* a *de facto* default, without notifying the Petitioner.

Then, rather than "refus[ing] to take the stand" or "declin[ing] to put on a case," *Respondent's Brief* at 4, the Petitioner, despite her initial inability, was able and allowed to commence cross examination of the guardian ad litem. However, shortly after beginning, the master ruled that the Petitioner could only continue cross examination if *she* first testified – without being *called* to do so.

When the Petitioner then claimed her medical concerns prevented her testimony, the master consequently prohibited her from completing her cross examination of the guardian, essentially ruling that, if she wanted to

subject the guardian's recommendation regarding custody to critical questioning, she herself ought to be subject to full cross examination on all issues in the case. (This is in addition to the marital master's "refus[al of] the Petitioner's request to present competent medical evidence on the issue of immunization." *Petition for Writ of Certiorari* at 14.)

Respondent's Brief further misstates the record by portraying the divorce decree as imposing a mental examination of the Petitioner as a condition precedent for her renewed visitation. *Id.* at 4. To the contrary, the decree only provides the guardian ad litem authority to direct such screening. *Id.*, App. 9 ("Appendix B").

While Respondent accurately cites an early trial court order as showing the "court recogniz[ing] early in these proceedings that joint legal custody {*may* not be} appropriate in this case," *Respondent's Brief* at 13, and characterizing the parties' disagreement over immunization as "the parties' inability to agree on basic needs for the child," *id.* (*citing* order at App. 16), approximately one year later, after conducting a full evidentiary hearing on the issue of immunization, the same marital master reversed course, holding, "the Court is reluctant to deny the [Petitioner] her rights under the statute," citing New Hampshire's immunization law.

The marital master stated at the hearing, "with respect to any order of immunization, I don't have the authority to allow one parent or another to immunize or not immunize. I don't have the authority to say the child shall be immunized or he shall not be." The master opined, "As far as I can see, the issue is based upon – or

rather the ruling is based upon whether or not one party or the other has sole legal custody." The master therefore appropriately limited the scope of the hearing: "Under sole legal custody, it would seem to me, that *all* of the decisions with respect to health, education and welfare of the minor child is in the sole purview of the person who has sole legal custody, so we'll maintain our focus on that issue." Ultimately, the master found: "I have no problem with finding that a parent . . . can rationally object to a child being immunized."

This later hearing resulted in a decree on pending motions, dated May 9, 1996, in which the trial court, having considered all of the facts and relevant law, denied the Respondent's bid for sole legal custody.

II. Reply to Respondent's argument

Respondent's Brief essentially ignores the gist of Petitioner's constitutional argument, which is *not* that the Due Process Clause of the Fourteenth Amendment requires an affirmative and specific evidentiary finding that a child's welfare would in fact otherwise be jeopardized before a state court awards *physical* custody to one parent. *Cf. Respondent's Brief* at 10-13.

Petitioner does argue, however, given the *practical* impact that a decree of sole *legal* custody has – which, by removing her check on the other parent's power to affect the child's interests, is effective termination of the non-custodial parent's interest, and freedom of personal

choice, in matters of family life – the standard is constitutionally required for this specific class of sole custody awards.

Respondent disagrees with Petitioner's analogy to termination-of-parental rights cases, arguing that the Petitioner instead could "move the superior court to modify its earlier decree of custody in the future." *Id.* at 12. However, as admitted by the Respondent, recently attempted that very course, but was denied, "for failure to raise any changed circumstances . . . "

This underscores the danger where, as in the case at bar, the decree lacks any specification of a danger that is a "circumstance" amenable to *being* "changed": Petitioner is effectively denied any later opportunity for review or modification, "because she cannot demonstrate removal of a danger to the child that is nowhere articulated on the record – thus there has been a *de facto* permanent termination of the Petitioner's parental rights, or the effective equivalent thereof." *Petition for Writ of Certiorari* at 24-25.

Respondent appears to counter this by arguing that the Petitioner's constitutional rights must be balanced against the child's, which the State purportedly safeguards through its use of the simple "best interests of the child" standard. *See Respondent's Brief* at 12-13. Respondent apparently but mistakenly argues that this Court vests states with the duty of safeguarding children's equal protection rights through reliance on that standard:

> "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."

Id. at 13 (*quoting Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984)).

In *Palmore*, however, the Court reversed "a judgment of a state court divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race," *id.* 466 U.S. at 430, 104 S.Ct. at 1880, resting the decision on equal protection grounds alone, while not reaching any potential due process issue, *id.* 466 U.S. at 433 n. 2, 104 S.Ct. at 1882 n. 2. The case did not involve legal custodial rights, *i.e.*, it did not involve the parents' respective rights to affect the interests of the child – through anything other than the home in which the child was placed – so that the only interest of the child the parties disputed was whether she might be " 'subject to environmental pressures not of choice[, *i.e.*,] . . . the social stigmatization that is sure to come.' " *Id.* 466 U.S. at 431, 104 S.Ct. at 1881 (citations omitted).

Thus, by reversing the award based on the *non*-custodial parent's right to equal protection, *Palmore* is similar to the termination-of-parental rights cases, on which Petitioner relies, where terminations were reversed due to a violation of *parents'* due process rights. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403 (1982).

Respondent essentially takes the position that the State's interest in protecting "the best interests of the child" supplants the constitutional interests of the parents or guardians. However, that is not the standard enunciated by this Court (as selectively quoted by the Respondent, *see Respondent's Brief in Opposition* at 12), in *Reno v. Flores*, 507 U.S. 307, 303-304, 113 S.Ct. 1439, 1448

(1993) (" 'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion – much less the sole *constitutional* criterion – for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. . . . Similarly, 'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated . . . to the interests of the parents or guardians themselves." (Citations omitted).)

Respectfully submitted,

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